



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kollsman, A Division of Sequa Corporation;
Applied Data Technology, Inc.

File: B-243113; B-243113.2

Date: July 3, 1991

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DIGEST

Although the Competition in Contracting Act of 1984 mandates that agencies obtain "full and open competition" in their procurements through the use of competitive procedures, the proposed sole-source award of a contract, under the authority of 10 U.S.C. § 2304(c)(1) (1988), to the only known qualified source is not objectionable where the agency does not have the necessary technical data to conduct a competitive procurement or sufficient time to permit reverse engineering of the item and required testing of an alternate source's ultimate product, and thus reasonably determined that only one source could supply the desired item within the critical time constraints of the procurement which were not the result of a lack of advance planning.

DECISION

Kollsman, A Division of Sequa Corporation, and Applied Data Technology, Inc. (ADTI) protest the Department of the Navy's proposed sole-source award to Cubic Corporation, Defense Systems Division, under solicitation No. N00163-91-R-0133, for 50 Aircraft Instrumentation Subsystem Internal (AISI) units. The AISI is a box that is mounted internally on the gun bay

doors of F-18 aircraft to record data concerning aircraft speed, acceleration, heading and weapon status, among other information, and transmit the data to a ground station for use in aircrew training and evaluation. The protesters challenge the Navy's determination that the agency does not possess an adequate technical data package (TDP) to conduct a competitive procurement and that only Cubic, which originally designed, developed, and manufactured the AISI units, can deliver the required 50 units within the agency's critical time restraints.

We deny the protests.

BACKGROUND

Cubic designed and developed the AISI in the early 1980s, using design data from the Aircraft Instrumentation Subsystem (AIS) it had earlier developed. The AISI is functionally similar, but physically dissimilar, to the AIS, which is a 5-inch diameter pod (missile-like in shape) that mounts externally to the aircraft and is more limited in function than the AISI. Although other contractors, including the protesters, have produced AIS-related items, Cubic is the only AISI supplier qualified by the Navy. In 1985, the Navy awarded a contract to Cubic for 20 AISI units for test and evaluation purposes. Under that contract, the Navy obtained only a limited TDP due to funding constraints. The limited TDP was deemed sufficient to meet the agency's minimum need to logistically support spare parts for the maintenance of a small quantity of AISI units.

On September 13, 1989, the Navy published a synopsis in the Commerce Business Daily (CBD) of an anticipated procurement of 48 "encrypted" AISI units and released a draft specification for this more advanced version of the AISI to the public for comment. The AISI being procured here is distinguishable from the encrypted AISI which has the additional functional capability to receive, test, and transmit classified scrambled signals used in missile testing. The encrypted AISI, which also attaches internally, but which has not been produced yet, is basically derived from the AISI unit that is the subject of the protested procurement.

Significant deficiencies were found in the Navy's basic AISI TDP during a review of that TDP in December 1989. In particular, the TDP lacks process and tooling information, numerous specification and test requirements, as well as tuning procedures necessary for production. Consequently, in February 1990, the Navy began a data package validation program for the AISI. This Navy TDP validation effort was to include building a small quantity of AISI units in-house to test the adequacy of the TDP. This in-house effort was

estimated by the Navy to cost approximately 8 million dollars and take 23 months to complete. At the same time, the Navy set out to develop its design specifications for the encrypted AISI.

In early 1990, excessive delays were experienced in the development of the encryption element of the encrypted AISI which, along with the significant defects in the available AISI technical data, caused the Navy, on March 22, 1990, to cancel its earlier synopsized encrypted AISI procurement.

On March 28, ADTI offered to assist the Navy in developing a full TDP for the AISI units. That offer was declined on April 13, however, in light of the Navy's planned in-house TDP validation effort and the Navy's on-going development of design specifications for the more technically advanced encrypted AISI. The agency also determined that its aircrew training efforts would suffer if additional AISI units were not obtained. In August, the Navy completed its testing of the performance of the AISI units it had previously obtained from Cubic. The Cubic AISIs were found to function successfully and on November 23, the Navy approved the AISI for production. In early November 1990, the Navy canceled its in-house AISI TDP validation effort because its estimated cost and time for completion was excessive and did not meet agency program needs.

Due to an immediate need for 50 AISI units "at the earliest possible date" for aircrew training purposes during the interim period before encrypted AISIs could be obtained, the agency, on November 26, published a CBD synopsis of its proposed sole-source procurement of the 50 AISIs to Cubic. That CBD notice stated that the Navy intends to award the sole-source contract to Cubic because Cubic is the only qualified source for the AISI and the government does not have a validated reprourement data package for the AISI acquisition. Since Cubic maintains the complete TDP for the AISI, and since no follow-on contracts are anticipated, the Navy proposes to award a contract under Cubic's part number for the AISI units. Although the Navy concedes that an electronics source other than Cubic could eventually produce an equivalent AISI through reverse engineering, the agency states that it does not have enough time or funding to permit that effort and that an award to Cubic offers less risk regarding timely delivery to meet its current minimum needs. The Navy estimates that it would take a contractor other than Cubic no less than 19 months to produce the AISI, whereas Cubic can start delivery of its tested AISIs within 12 months of award.

ADTI, on November 27, and Kollsman, on December 4, lodged objections with the agency against the proposed sole-source award to Cubic. Both protesters expressed their interest in

the procurement and requested consideration as alternate sources. Kollsman and ADTI were given the opportunity during the following 2 months to meet with and present information to the Navy regarding their qualifications and abilities to meet the Navy's AISI requirement. Finding that neither protester offered sufficient information to alleviate the agency's concerns about the adequacy of the TDP, and the ability of any firm other than Cubic to deliver operational units within the agency's time restraints, the Navy notified both protesters on February 27, 1991 that they were not considered alternate sources for the AISI. The Navy also informed the protesters that it intended to proceed with the proposed sole-source award to Cubic.

As a result of the protesters' concerns, the Navy initiated an independent assessment of the available TDP and the proposed sole-source procurement by the "Price Fighter" group within the Naval Supply Systems Command. That group, in a report dated March 20, 1991, found that due to "extensive technical data discrepancies" (e.g., Cubic's data package contains 122 TDP revisions in 72 drawings that are not part of the Navy's limited AISI TDP), and "the absence of critical high power RF circuitry tuning information," the Navy's TDP for the required AISIs is "not adequate for full and open competition." Although the Price Fighter group acknowledged that an award to Cubic would also involve some risk to the government due to the Navy's incomplete TDP, it concluded that the award of this final AISI procurement to a company other than Cubic "will most likely have an adverse effect on the cost, delivery schedule, and performance."

Kollsman filed its protest of the proposed sole-source award to Cubic with our Office on February 28. ADTI filed a similar agency-level protest with the Navy on March 11, which the agency denied on March 26. ADTI subsequently filed its protest with our Office on March 27.

On April 4, 1991, the Navy executed a final written Justification and Approval (J&A) authorizing the use of other than competitive procedures. The Navy justifies the proposed sole-source award under 10 U.S.C. § 2304(c)(1) (1988), which provides that an agency may use other than competitive procedures when the items needed are available from only one responsible source. According to the J&A, since no other source possesses the necessary AISI data and experience, Cubic is the only company capable of providing the limited number of AISI units beginning 12 months from award. The J&A states that no additional procurements of this equipment are planned and that future competitive procurements of the encrypted AISI units are anticipated to meet the rest of the Navy's requirements for this type of equipment. The Navy has sought to limit its risk by procuring the AISIs from Cubic under the

proposed awardee's part number for the item rather than relying upon the limited TDP. The agency has held up making an award pending the resolution of the protests.

THE PROTESTS

The protesters put forth similar protest contentions, namely, that they possess the technical ability to timely produce the AISI units and thus should not be precluded from competing for the AISI requirement merely because the agency claims it does not possess a TDP adequate for competition.^{1/} Both protesters also contend that any alleged time restraints supporting the proposed sole-source award are the result of the agency's lack of advance planning.^{2/}

The protesters each claim to have relevant experience with AIS-related technology and assert that they can obtain the missing technical data by performing limited reverse engineering and by acquiring artwork, drawings, and information from industry sources. In particular, Kollsman asserts that it is qualified to produce the AISI in a timely and cost effective manner based principally upon its recent experience in the production of 325-AIS pods for the Navy and its engineering development of the Bomber Airborne Instrumentation System (BAIS) for the Air Force. Kollsman argues that the functional requirements of the AISI are identical to those of the AIS and BAIS, although there are physical dissimilarities. Kollsman further contends that it can produce the AISIs despite the

1/ ADTI also protests that the Navy failed to conduct a formal market survey of potential AISI sources. We find that since the Navy properly published a CBD synopsis of its proposed award and gave each company that responded to that notice an opportunity to present its qualifications, the agency made adequate attempts to ascertain whether other qualified sources capable of satisfying the government's requirements exist pursuant to Federal Acquisition Regulation (FAR) §§ 6.303-2 and 7.101.

2/ The protesters additionally contend that since Cubic pled guilty on January 15, 1991, to criminal actions relating to some of the firm's previous sole-source contract awards, it should not now be able to receive a sole-source contract. This concerns a matter of the offeror's responsibility. Cubic's admitted criminal actions do not involve this procurement and the record shows that no suspension or debarment proceedings have been initiated against Cubic. Since the agency has not yet made a determination of Cubic's responsibility, this issue is premature and not for our review at this time. See Everpure, Inc., B-231732, Sept. 13, 1988, 88-2 CPD ¶ 235.

incomplete TDP available since it produced its AIS pods from an incomplete TDP (which also had been obtained from Cubic) by reverse engineering a Navy supplied pod and by obtaining much of the necessary artwork from various vendors. Kollsman asserts that it could produce the AISI within 14 months of award without conducting certain required flight qualification testing.

ADTI similarly contends that it is qualified to produce the AISI, despite the claimed defective TDP, due to the fact that much of its engineering staff was previously employed by Cubic where they had an integral role in the design and development of the AISI. ADTI states that it has more recent experience than Cubic with AISI technology since it provided the latest F/A-18 compatibility upgrades to the AISI software. ADTI further asserts that no significant reverse engineering would be required for it to produce the AISIs. Although ADTI does not have a complete data package, the protester asserts that its engineers have retained a working knowledge of the AISI system, that much of the system's circuitry is not unique, and that much of the missing data necessary for production could be easily obtained from other sources and by access to an existing AISI. ADTI has proposed to meet a 13-month delivery schedule for initial production of the AISI. ADTI, as well as Kollsman, contends that the Navy's 12-month delivery schedule here is unreasonable since the time constraints the agency complains of are the result of the Navy's lack of advance planning since it allegedly knew of its need for additional AISIs and the problems with the AISI TDP since 1989. Since Cubic in the past has delivered AIS components to the government behind schedule, ADTI argues it is questionable whether even Cubic will in fact meet the 12-month delivery schedule set out in the present solicitation.

The Navy responds that it considered the experience of both protesters in determining whether alternate AISI sources were available. The Navy found, however, that no alternate source exists in light of the incomplete AISI TDP and the fact that there is not sufficient time to permit reverse engineering efforts. The agency explains that a current lack of AISI units, having a "significant detrimental impact on training and combat readiness," has necessitated the delivery of at least 50 interim-AISI units "as quickly as industry is able to do so." The agency determined that only Cubic could meet its critical time restraints since the proposed awardee could start delivery of fully-tested AISI units for immediate use within 12 months of contract award. The Navy concludes that although the protesters, and perhaps other electronic sources, could reverse engineer the AISI, neither protester has persuasively shown that it would be able to complete that process and deliver operational, fully-tested AISI units within its required delivery schedule.

Specifically, the Navy reports that it found Kollsman's AIS pod experience insufficient to demonstrate its claimed ability to successfully produce the required AISI units from the incomplete TDP. The Navy principally based its determination on the fact that each of the 325 AIS pods produced by the protester, which were based upon a similarly limited TDP procured from Cubic, are currently "grounded" due to significant performance problems experienced after only minimal use of the pods. Since the BAIS units developed by Kollsman are not scheduled for first article testing until 1992, the Navy also could not consider Kollsman's BAIS experience sufficient to qualify the protester as an alternate source for the AISI.

As for ADTI, the Navy recognizes that the protester recently provided AISI software upgrades to the government, but determined that since the Navy will provide the software under the current procurement, this experience was inadequate to demonstrate the company's alleged ability to timely provide the required hardware being sought. Although the Navy acknowledges that many of Cubic's past AISI engineers are now employed by ADTI, the agency states that neither those individuals nor ADTI possesses the complete AISI TDP. Since at least 5 years have past since those engineers initiated the development of the AISI, the Navy questioned whether ADTI could produce the exact item called for as quickly as Cubic could with limited risk to the government.

While the overriding mandate of the Competition in Contracting Act of 1984 (CICA) is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), CICA does permit noncompetitive acquisitions in specified circumstances such as when the items needed are available from only one responsible source. 10 U.S.C. § 2304(c)(1); Elbit Computers, Ltd., 69 Comp. Gen. 591 (1990), 90-2 CPD ¶ 26. Where the agency has substantially complied with the procedural requirements of CICA, 10 U.S.C. § 2304(f), calling for the written justification for and higher level approval of the contemplated sole source action and publication of the required CBD notice, we will not object to the sole-source award unless it is shown that there is no reasonable basis for the award. Elbit Computers, Ltd., 69 Comp. Gen. 591, supra; see also Dynamics Instruments, Inc., B-220092, et al., Nov. 25, 1985, 85-2 CPD ¶ 596. In sum, except in those noncompetitive situations that arise from a lack of advance planning, a sole-source award is justified where the agency reasonably concludes that only one known source can meet the government's needs within the

required time. Astron, B-236922.2, May 2, 1990, 90-1 CPD ¶ 441; Turbo Mechanical, Inc., B-231807, Sept. 29, 1988, 88-2 CPD ¶ 299.

The protesters complain that the proposed sole-source action results from the Navy's lack of advance planning in not obtaining an adequate TDP to permit competition and thus, pursuant to 10 U.S.C. § 2304(f)(5)(A), cannot be properly justified under CICA. We find that the record does not support that assertion. It was only after the unexpected cancellation of the encrypted AISI procurement on March 22, 1990, due to unanticipated problems--the design immaturity of and development problems with the AISI encryption device--that the agency's current need for additional basic AISIs arose. At that time, the agency was conducting an in-house TDP validation effort including the building of some AISIs which apparently would have met the agency's then current need for a small quantity of units, while continuing its performance evaluation of the AISIs it possessed. Although the need for more units was known in early 1990, the Navy was pursuing reasonable means to validate the AISI TDP and to acquire the AISIs by an in-house effort. The record shows that its in-house effort was continued in good faith until its cancellation due to funding and time constraints. It was only shortly after that cancellation that the agency finally completed its ongoing testing of Cubic's AISIs under the 1985 contract, which were subsequently approved for production, and proposed the award of 50 AISIs to Cubic, the only known qualified AISI supplier, in order to meet its short-term training requirements. We thus find no evidence of a lack of advance planning.


The Navy has complied with the procedural requirements of CICA at 10 U.S.C. § 2304(f), calling for written justification and higher level approval of the contemplated sole-source action and publication of the requisite CBD notice. The propriety of the agency's decision therefore rests on whether it was reasonable to conclude that only one source was available within the required time frame.

The Navy reviewed the protesters' qualifications submissions in light of the defective TDP available and determined that each protester's experience was insufficient to demonstrate that it could reverse engineer, develop, test, and deliver fully-operational AISI units, which would be functionally interchangeable with existing Navy units, within the approximate time that Cubic could do so. The Navy has experienced problems with the AIS pods Kollsman manufactured from a similarly defective TDP and since the BAIS developed by Kollsman is physically dissimilar to the AISI and has not yet been tested, we find reasonable the Navy's exclusion of Kollsman as an alternate source for the present requirement.

Similarly, we find reasonable the agency's failure to consider ADTI an alternate source since although ADTI has very recent AISI software experience and employs many of the engineers that designed and developed the AISI for Cubic, the firm still does not possess the complete TDP maintained by Cubic.

The record supports the need for the additional AISI units for ongoing combat training requirements and that the failure to obtain these units "as soon as possible" will adversely affect the combat readiness of Naval pilot trainees. We thus find that the record supports the legitimacy of the Navy's critical need and delivery requirements, and that the protesters, which have to reverse engineer the AISI, have not given adequate assurance that they will provide fully tested, operational units within the agency's 12-month delivery schedule. We therefore find reasonable the Navy's determinations that Cubic is the only available source that can meet its requirements and that an award to Cubic would limit the possible risks and delays to the government that might otherwise arise from an award to a firm that does not possess the full TDP for the AISIs. See Univox California, Inc.; Univox Int'l, Inc.; Cosmodyne, Inc., B-225449.2 et al., Dec. 9, 1987, 87-2 CPD ¶ 569. Consequently, we find proper the Navy's proposed sole-source award to Cubic.

The protests are denied.


James F. Hinchman
General Counsel